



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2007

Ms. Sandra D. Carpenter
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2007-11202

Dear Ms. Carpenter:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 287706.

The Terrell Independent School District (the "district"), which you represent, received a request for information pertaining to a former district teacher. You state that the district has released some of the requested information but claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Education Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is

¹A copy of this letter may be found on the attorney general's website, available at http://www.oag.state.tx.us/opinopen/og_resources.shtml.

disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). We note that it appears the district has redacted some of the submitted information pursuant to FERPA. However, portions of the submitted information appear to consist of unredacted education records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue.² Such determinations under FERPA must be made by the educational authority in possession of the education record. Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). We will, however, address your remaining arguments against the disclosure of the submitted information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses federal statutes. The submitted information contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses state confidentiality provisions, like section 21.048 of the Education Code, which provides in part:

(c-1) The results of an examination administered under this section are confidential and are not subject to disclosure under [the Act] unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

²In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Educ. Code § 21.048(c-1). We note that subsection 21.048(c-1), as added to section 21.048 by the Eightieth Legislature, is a new statute that took effect June 15, 2007. *See* Act of May 28, 2007, 80th Leg., R.S., S.B. 9, § 4 (to be codified at Educ. Code Ann. § 21.048(c-1)). The remaining information contains references to an individual who appears to have failed examinations administered under section 21.048 of the Education Code five times or less. If, in fact, the individual failed the examinations five times or less, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.048(c-1) of the Education Code. However, if the individual failed the examinations more than five times, the information we have marked under section 21.048(c-1) must be released.

Section 552.101 also encompasses section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.*

You assert that some of the submitted documents consist of evaluations of an individual who was employed as a teacher at the time of the evaluations. Based on your representation and our review, we agree that some of the documents at issue are made confidential by section 21.355 and must be withheld under section 552.101. We have marked these documents accordingly. However, upon review, we find that some of the documents that the district seeks to withhold on this basis consist of correspondence with regulatory agencies regarding the former teacher’s resignation, blank evaluation forms, correspondence supporting the teacher’s removal, and a rejection of the former teacher’s appeal of the withdrawal of his certification, rather than performance evaluations. We therefore find that none of this remaining information is made confidential by section 21.355 and it may not be withheld under section 552.101 on this basis.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which governs information obtained in the course of conducting a polygraph examination and provides that “a person for whom a polygraph examination is conducted . . . may not disclose information acquired from a polygraph examination” except to certain categories of people. Occ. Code § 1703.306(a). The requestor does not fall within any of the enumerated categories; therefore, the district must withhold the polygraph information, which we have marked, under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

We now address the district’s assertions under common-law privacy. Section 552.101 also encompasses common-law privacy. Section 52.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-*

Hanks Texas Newspapers, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 52.101. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85. Accordingly, we will consider your section 552.101 and section 552.102(a) privacy claims together.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. Generally, the public has a legitimate interest in information that relates to public employment and public employees. See Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not protected by constitutional or common-law privacy under statutory predecessors to 552.101 and 552.102). Information that pertains to an employee's actions as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. See Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

This office has also found a compilation of an individual's criminal history record information to be highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Cf. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. We have marked the information that the district must withhold as confidential under sections 552.101 and 552.102(a) in conjunction with common-law privacy. We find, however, that the remaining information is not intimate or embarrassing or concerns matters of legitimate public interest. Therefore, none of the remaining information is confidential under the doctrine of common-law privacy, and it may not be withheld under section 552.101 or 552.102(a).

Section 552.102(b) of the Government Code excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). This section further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee"

are not excepted from disclosure. Thus, except for the information that reveals the degree obtained and the courses taken, the district must withhold the submitted transcripts under section 552.102(b).

You claim that the some of the remaining information is protected based on the attorney-client privilege. When asserting the attorney-client privilege under section 552.107 of the Government Code, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Here, you state that the information at issue consists of confidential communications between district employees and attorneys for the district. You further state that these communications were made for the purpose of providing legal services and that confidentiality has been maintained. Upon review of your arguments and the submitted documents, we find that the information we have marked consists of privileged attorney-client communications that the district may withhold under section 552.107. However, you do not explain the district’s

relationship with, or the capacities of, some of the parties involved in the remaining communications for which you claim this exception. Because you have not demonstrated how these individuals are parties who come within the attorney-client relationship for purposes of the attorney-client privilege, none of the remaining information may be withheld on the basis of section 552.107.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. In this instance, you have provided documentation reflecting that the former district employee at issue timely requested confidentiality for his social security number under section 552.024. Based on your representations and supporting documentation, we have marked the information that the district must withhold under section 552.117(a)(1) of the Government Code. We have marked additional information that the district must also withhold under section 552.117(a)(1), to the extent that the employee to whom this information pertains timely elected confidentiality for this information under section 552.024.

We note that the remaining information includes Texas motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information that "relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state."³ Gov't Code § 552.130(a)(1), (2). The district must withhold the Texas motor vehicle record information, which we have marked, pursuant to section 552.130.

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" subject to FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. The submitted I-9 form may only be released in compliance with federal law. To the extent the information we have marked consists of the results of examinations administered under section 21.048 of the

³ The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Education Code and the individual failed the examinations five times or less, the district must withhold the information at issue under section 552.101 of the Government Code. The district must withhold the submitted teacher evaluations, which we have marked, under section 552.101 in conjunction with section 21.355 of the Education Code. The district must also withhold the polygraph information that we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code. We have marked information that is confidential under common-law privacy and must be withheld under sections 552.101 and 552.102(a) of the Government Code. Other than information that reveals the degree obtained and the courses taken, the submitted transcripts must be withheld under section 552.102(b) of the Government Code. The district may withhold the information we have marked under section 552.107 of the Government Code. We have marked information that must be withheld under section 552.117(a)(1) of the Government Code if the employees to whom it pertains timely elected confidentiality. Finally, the district must withhold the Texas motor vehicle record information that we have marked under section 552.130 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "L. Joseph James". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/eeg

Ref: ID# 287706

Enc. Submitted documents

c: Ms. Angie Hiepler
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(w/o enclosures)